STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2001 OAL Determination No. 1

February 7, 2001

Requested by: **LENZIE L. JACKSON**

Concerning: **CALIFORNIA DEPARTMENT OF CORRECTIONS RULE CONCERNING CUSTODY CREDIT AWARDED TO PRISONERS RESENTENCED PURSUANT TO *PEOPLE V. ROMERO***

Determination issued pursuant to Government Code Section 11340.5; California Code of Regulations, Title 1, Section 121 et seq.

ISSUE

Does a rule contained in an instructional memorandum utilized by the California Department of Corrections concerning computation of custody credits for inmates resentenced pursuant to *People v. Romero* constitute a "regulation" as defined in Government Code section 11342.600, which is required to be adopted pursuant to the Administrative Procedure Act (Gov. Code, div. 3, tit. 2, ch. 3.5, sec. 11340 et seq.; hereafter, "APA")? [1]

1. This request for determination was filed by Lenzie L. Jackson, J-75322, California State Prison, Solano, Bldg. 15-N-1-L, P.O. Box 4000, Vacaville, CA 95696-4000. The California Department of Corrections' response was filed by John H. Sugiyama, Deputy Director, Legal Affairs Division, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001. This request was given a file number of 99-021. This determination may be cited as "**2001 OAL Determination No. 1.**"

CONCLUSION

A rule contained in an instructional memorandum utilized by the California Department of Corrections ("Department") concerning computation of custody credits for inmates resentenced pursuant to *People v. Romero* constitutes a "regulation" as defined in Government Code section 11342.600, and is required to be adopted and codified pursuant to the rulemaking procedures of the APA.

BACKGROUND AND ANALYSIS

On September 7, 1995, the requester, Lenzie Jackson, was sentenced to 25 years to life under Penal Code section 667, subdivisions (b) – (i) and section 1170.12 (Three Strikes law) following a conviction for sale of marijuana. Less than one year later, the California Supreme Court decided *People v. Romero* (1996) 13 Cal.4th 497, 53 Cal.Rptr. 2d 789. The Court held that a trial judge on his or her own motion had the power "to strike prior felony conviction allegations in cases brought under the Three Strikes law." (13 Cal.4th at 529 - 30, 53 Cal.Rptr. at 808.) Following *Romero*, many inmates of the Department sentenced under the Three Strikes law, including Mr. Jackson, sought reduction of their sentences.

On August 15, 1997, the Sacramento County Superior Court struck one of Jackson's two prior felony convictions pursuant to *Romero*. This meant he was now a "two striker," and he was, accordingly, resentenced to a term of eight years in state prison pursuant to Penal Code section 667, subdivision (e)(1). The Superior Court noted that post sentence conduct and work credits were to be determined by the Department.[2]

Mr. Jackson subsequently submitted an inquiry to the Department, claiming that he had not received credit for all the time that he had spent in the custody of the Department. The Department informed Mr. Jackson that he had already received all custody credits to which he was entitled[3] and was advised that the Department had made its determination "[p]er the Instructional Memorandum, CR/96/27."[4] Memorandum CR/96/27 outlines the procedure to be followed when an inmate is resentenced pursuant to *Romero*. In his request for determination, Mr. Jackson took issue with this memorandum, which provides in part as follows:

---

2. See nunc pro tunc order of the Superior Court, dated Dec. 31, 1998, attached as Exhibit D1 to request for determination.
3. Memorandum dated April 1, 1999, p. 1.
4. Memorandum from A. C. Newland, Warden of State prison at Vacaville dated May 13, 1999.

> "Pursuant to PC Section 1170.12(a)(5), once the inmate has been physically placed in CDC the total amount of credit awarded shall not exceed one-fifth of the total term. By including CDC time in the actual time and calculating conduct credits on the CDC time at a rate greater than one-fifth, the court has granted excessive conduct credits.
>
> "In an effort to alleviate this problem, cases resentenced pursuant to People v. Romero will be an exception to our policy regarding resentenced cases. . . . . ***Do not change the term starts date****, leave the original term starts date, original presentence and post sentence credits."* [Emphasis in original.]

It is the provisions contained in the above instructional memorandum governing the "start date" and consequently credit given to inmates resentenced pursuant to *Romero* that are the subject of this regulatory determination.

A determination of whether the Department's rule is a "regulation" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged rule is a "regulation" within the meaning of Government Code section, 11342.600, and (3) whether the challenged rule falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly or specifically exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code secs. 11342.520 and 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code sec. 11000.) The Department is in neither the judicial nor legislative branch of state government, and therefore, unless expressly or specifically exempted therefrom, the APA rulemaking requirements generally apply to the Department.

In addition, Penal Code section 5058, subdivision (a), declares in part as follows:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA] . . . .* [Emphasis added.]"

OAL concludes that APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in Section 11342.600, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

Government Code section 11342.600, defines "regulation" as follows:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 - 275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." (*Ibid*.)

Under Government Code section 11342.600, a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

In this analysis, we are guided by the California Court of Appeal in *Grier v. Kizer*, *supra*:

> "[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.[5])

The Department's Instructional Memoranda

The Department maintains that the memorandum in question merely discusses situations where a trial court modifies the award of presentence credits after resentencing an inmate in light of the *Romero* opinion and impacts only a small percentage of inmates "resentenced in light of that opinion."[6]

Even though the number of persons in a class may be small, this does not negate the existence of a general rule. For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class); *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, 59 Cal.Rptr.2d 186, 194 (In order for the APA to be applicable to a rule, "the agency must intend its rule to apply generally, rather than in a specific case . . . . [A] rule applies generally so long as it declares how a certain class of cases will be decided.").)

The Department also maintains that the memorandum in question was designed to fit a "*particular set of circumstances*" created by the *Romero* opinion. (Emphasis added.)[7]

---

5. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law for these purposes.
6. Department's response, p. 2.
7. *Id.*, p. 2.

This "particular set of circumstances," however, is not necessarily the same as a case-specific application. It involves a class of inmates, not just a specific inmate. Moreover, virtually all regulations adopted by state agencies apply to particular situations and particular groups of people.

In this regard, *Taye v. Coye* (1994) 29 Cal.App.4th 1339, 35 Cal.Rptr.2d 27, relied on by the Department, is distinguishable. It involved the application of a rule to a specific case and not a class of individuals. The court noted as follows:

> "The auditing method used by LaPlaunt here, in contrast, was not a standard of general application used in all Medi-Cal cases. Thus, LaPlaunt declared: 'The audit procedures used to conduct the audit of Pride Home Care Medical *were designed to fit the particular conditions that were encountered upon the arrival at the audit site*.'" (29 Cal.App.4th at 1345, 35 Cal.Rptr.2d at 31 [Emphasis added].)

The Department further maintains that it is doing nothing more than issuing directives concerning the *Romero* opinion. As support for this position, it relies on *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 285 Cal.Rptr. 515 in which the court found that the interpretation by the Division of Labor Standards Enforcement (DLSE) of a wage order issued by the Industrial Welfare Commission did not constitute a regulation that was subject to the APA. The Department maintains that like the DLSE, it provides staff with assistance in dealing with orders from an outside entity.[8]

Aguilar relied on *Skyline Homes, Inc. v. Department of Industrial Relations*, 165 Cal.App.3d 239, 211 Cal.Rptr. 792 in its holding that interpretations of wage orders by the DLSE are not regulations subject to the APA. *Skyline Homes*, however, has been disapproved by the California Supreme Court on precisely the same ground. In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 59 Cal.Rptr.2d 186, the Supreme Court stated as follows:

> "The policy for calculating overtime pay at issue in *Skyline Homes* was a regulation within the meaning of the APA because it was a standard of general application interpreting the law the DLSE enforced and because it was not merely a restatement of prior agency decisions or advice letters. *We acknowledge that the employer challenged the policy in the context of a particular adjudication, but this fact does not alter its character as a policy*

8. *Id.*, p. 2.

> *of general application and thus a regulation*. We disapprove *Skyline Homes* to the extent that it concludes otherwise." (14 Cal.4th at 573, 59 Cal.Rptr.2d at 196 [Emphasis added].)

Thus, to the extent that *Aguilar* held that interpretive rules need not be adopted pursuant to the APA, *even in case specific situations*, it is at odds with *Tidewater* and, thus, not determinative of this issue.

Additionally, the Supreme Court went on to hold in *Tidewater* as follows:

> "The policy at issue in this case was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment. In addition, the policy interprets the law that the DLSE enforces *by determining the scope of the IWC wage orders*. . . . Accordingly, the DLSE's enforcement policy appears to be a regulation within the meaning of Government Code section 11342, subdivision (g)." (14 Cal.4th at 572, 59 Cal.Rptr.2d at 195 [Emphasis added].)

For these reasons, we conclude that the rule enunciated in Department memorandum CR/96/27 is one of general application.

The key issue for this determination is whether the Department's policy is merely a restatement of current law or whether it further implements or interprets the law governing the manner in which an inmate's sentencing time is computed.

The Department states that the memorandum in question was designed to make staff aware that some inmates committed to state prison pursuant to the Three Strikes law may be resentenced in light of the *Romero* opinion but does not interpret or implement *Romero*. The Department maintains that the memorandum is not regulatory, but is merely designed to instruct staff on the appropriate method to process court orders issued pursuant to the *Romero* case.[9]

The manner in which the Department characterizes its memorandum, however, is not dispositive. *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

---

9 . *Id.*, pp. 1 - 2.

> ". . . [The] Government Code . . . [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it*. . . . [Emphasis added.]" (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

With respect to whether a rule of general application is meant to implement, interpret, or make specific a law, or other regulation, in *Union of American Physicians & Dentists v. Kizer* (1990), the agency argued that its documentation requirements were not subject to the APA because they "were 'simply informational in nature and [did] not seek to substantially regulate behavior.'" The California Court of Appeal rejected this argument, noting that agency rules that do no more than implement, interpret, and make specific the law enforced or administered by the agency require the promulgating agency to comply with the APA. (223 Cal.App.3d at 502, 272 Cal. Rptr. at 892.)

In order to understand whether the Memorandum CR/96/27 implements, interprets, or makes specific the law, some discussion of the underlying legal principles governing sentencing credits is necessary. In this connection, persons convicted of felonies frequently spend time in local jails prior to being sentenced to state prison and are entitled to "presentence" credit for this time as well as for "behavior" and "worktime" credits, specified in Penal Code section 4019, that they would have been entitled to while in prison (see Pen. Code secs. 2900.5 (a) and 4019; *People v. Chew* (1985) 172 Cal.App.3d 45, 48, 217 Cal.Rptr. 805). In other words, a prisoner who serves presentence time in a county jail is entitled to receive credit for both the actual days served and additional conduct behavior and worktime credit.

When a prisoner becomes an inmate in the state prison system, he or she may also be eligible for conduct and worktime credits. But these *postsentence* credits are calculated using different formulae. (See Penal Code secs. 2930 – 2935.) Credits for inmates receiving sentences under the Three Strikes law, however, are significantly curtailed. As a general matter, the total amount of credits awarded may not exceed one-fifth of the total term of imprisonment imposed and do not accrue until the defendant is physically placed in the state prison. (See Pen. Code sec. 1170.12(a)(5)).

Matters become more complex when an inmate's original sentence is set aside or modified *after* he or she has served part of it in state prison. The general rule, as

discussed in *People v. Chew, supra*, 172 Cal.App.3d 45, 217 Cal.Rptr. 805, is that credit should be based on actual days served. As stated by the court: ". . . time spent in prison between the initial sentencing and resentencing or a new sentence is properly characterized as presentence time. Defendant is entitled to credit for the prison time as if no appeal had been taken." (172 Cal.App.3d at 47, 217 Cal.Rptr. at 806.)

Thus, the issue in Mr. Jackson's case is whether credits awarded to him were in the nature of presentence or postsentence credits. In *People v. Hill* (1995) 37 Cal.App.4th 220, 44 Cal.Rptr.2d 11, at issue was whether *postsentence* credit limitations imposed by the Three Strikes law also applied to presentencing credits. The court held that they did not. It noted as follows:

> "[S]ubdivision (c)(5) of section 667 [of the Penal Code] limits prison credit; we must now determine whether it eliminates presentence conduct credit. The subdivision provides: 'the total amount of credits awarded pursuant to Article 2.5 . . . shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.' Article 2.5 . . . provides for prison credit on a term of imprisonment. *It does not include presentence conduct credit, which is governed by sections 2900.5 and 4019*. Defendant contends that since there is no reference to presentence conduct credit in subdivision (c)(5) of section 667, there was no change in existing law and he is entitled to such credit for the period he spent in jail. He is correct." (37 Cal.App.4th at 224, 44 Cal.Rptr.2d at 12 [Emphasis added]. *Accord*, *People v. Thomas* (1999) 90 Cal.Rptr.2d 642, 644; *People v. Caceres* (1997) 52 Cal.App.4th 106, 110, 60 Cal.Rptr.2d 415, 417.)[10]

When Mr. Jackson was resentenced, the trial court awarded him credits under sections 2900.5 and 4019 for prior time spent in the county jail as well as credit for the time he previously spent under his original sentence in the custody of the Department. All of this was predicated on the *prospective* execution of the new sentence.

In this respect, the trial court noted as follows:

---

10. Section 667, subdivision (c) of the Penal Code, the legislative version, is virtually identical to section 1170.12, subdivision (a), the initiative measure.

> "At the August 15 resentencing, the court did not calculate the time credits of Mr. Jackson. The court chose to order the new sentence to be Nunc Pro Tunc to the date of the original sentencing. The court assumed the Department of Corrections would then recalculate the time credits, since Mr. Jackson had been in the custody of the Department since September of 1995, except for a period of a few days.
>
> However, it now appears that the better procedure is for the trial court to calculate the presentence credits as of the date of resentencing, August 15, 1997." (Abstract of Judgment, attached as Exhibit D1 to request for determination.)

This ruling appears consistent with the principle that it is the province of the court to calculate presentence time and conduct credits, and the province of the Department to calculate conduct and work credits for the time the inmate is in its custody. (Penal Code section 2900.5; *People v. Chew*, *supra*, 171 Cal.App.3d at 47, 217 Cal.Rptr. at 806; *People v. Robinson* (1994) 25 Cal.App.4th 1256, 1257 – 58, 31Cal.Rptr.2d 445, 446 - 47; *People v. Thornburg* (1999) 65 Cal.App.4th 1173, 1175 – 76, 77 Cal.Rptr.2d 288, 289.)

Mr. Jackson maintains, however, that the Department used the wrong start date for purposes of his resentencing. He claims it should have been August 22, 1997, the date he began serving his new sentence, not September 19, 1995, the date of his original imprisonment. In this respect, Mr. Jackson argues that the Department's Instructional Memorandum CR/96/27 incorrectly applies the law under *Romero* because it requires the use of the original sentencing date when an inmate is resentenced rather than the date of resentencing. Because a determination by OAL, pursuant to Government Code section 11340.5, is limited to whether or not an uncodified agency rule meets the definition of "regulation" as provided in Government Code section 11342.600, we do not consider in this determination whether or not the Department correctly calculated Mr. Jackson's resentence in accordance with the law.

However, as pointed out above, the Department's Memorandum CR/96/27 does instruct that, with respect to resentencing cases under *Romero*, "[d]o not change the term starts date, leave the original term starts date, original presentence and post sentence credits." The Department indicated in that memorandum that this method of calculation was necessary to alleviate excess credits granted by the court by including Department time at a rate greater than the one-fifth rate provided for in Penal Code section 1170.12(a)(5).

We think the procedure established by the Department to retain the original sentence date in *Romero* situations, whether consistent with the law or not, implements, interprets, or makes specific the law with respect to the calculation of credits. (See *Engelmann v. State Bd. of Education*, 2 Cal.App.4th at 62, 3 Cal.Rprt.2d at 275.) Thus, we conclude that the policy employed by the Department is a "regulation" and is subject to the APA unless expressly exempted by statute.

The Temporary Nature of the Rule in Question

The Department maintains that the memorandum in question was designed to deal with a short-term issue created by a judicial opinion and was not designed to announce the promulgation of permanent CDC policy.[11]

Despite the fact that the Department may no longer be applying this instructional memorandum for resentencing cases which may arise in the future, applicability of the APA does not depend on the duration of the rule in question. Government Code section 11342.600, defines in part the term "regulation" as ". . . *every* rule, regulation, order, or standard of general application." (Emphasis added.) No minimum time requirements are included in this definition. If it were, state agencies could circumvent the APA by adopting a series of short-term underground regulations, each with a limited duration.

In addition, nothing in the Department's response suggests that the rule in question is now moot. In fact, just the opposite appears to be the case. The Department in computing Mr. Jackson's new sentence applied Instructional Memorandum CR/96/27. A May 13, 1999 memorandum written by the Warden of the State Prison at Vacaville to Mr. Jackson states in part as follows:

> "Per the Instructional Memorandum, CR/96/27, we have retained your original received date of September 19, 1995, with a term of 8 years, and with 72 days PC2900.5 credits, 36 days PC4019 credits and 11 days of post sentence credits."

Lack of Authority

The Department states that it is not responsible for the enforcement or administration of either the *Romero* opinion or the Three Strikes law.[12]

---

11. Department's response, p. 2.
12. *Id.*, p. 1.

Presumably, the implication of this argument is that since the Department has no authority to enforce certain laws, it could not have adopted rules that are underground regulations.

The *Romero* opinion gave the *courts* the authority to resentence certain classes of inmates. But, the authority to resentence is not the issue with which this determination is concerned. Rather, it is the policy enunciated in the memorandum in question relating to the manner of calculating presentence credits for inmates who have already been resentenced pursuant to *Romero* that is the issue.

Even if the Department lacks the "legal capacity" to issue or enforce a particular rule, this does not mean it cannot *in fact* do so. The test for the existence of a "regulation" is not whether there is sufficient authority or legal capacity, but rather the "*effect and impact on the public*" of the agency action. (Emphasis added.) (*Winzler & Kelly v. Dept. of Industrial Relations* (1981) 121 Cal.App.3d at 127, 174 Cal.Rptr. at 744.)

(3) With respect to whether the Department's rules fall within any recognized exemption from APA requirements, generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346; *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 ("*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.*" [Emphasis added.])[13]

The Department does not contend that any *express* statutory exemption applies. Our independent research having also disclosed no express statutory exemption, we conclude that none applies.

Therefore, we conclude that a rule contained in an instructional memorandum utilized by the California Department of Corrections concerning computation of custody credits for inmates resentenced pursuant to *People v. Romero* constitutes a "regulation" as defined in Government Code section 11342.600, and is required to be adopted and codified pursuant to the rulemaking procedures of the APA.

---

13. The rules at issue in *Stamison* were subsequently expressly exempted from the APA by statute. (See Stats. 1998, ch. 731, § 1, p. 3889, codified at Gov. Code § 14615.1.)

DATE: February 7, 2001

DAVID B. JUDSON
Deputy Director and Chief Counsel

DEBRA M. CORNEZ
Senior Staff Counsel
Determinations Program Coordinator

GEORGE P. RITTER
Senior Staff Counsel

Regulatory Determinations Program
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, CALNET 8-473-6225
Facsimile No. (916) 323-6826
Electronic Mail: staff@oal.ca.gov

i:\2001.1